SUPREME COURT, U.S.
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

NO. [redacted]7

LOUIS JOSEPH ABBATE and
MICHAEL LOUIS FALCONE,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES

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The government's statement of the case is for the most part an incomplete repetition of petitioners' statement of the case. It also contains a number of unwarranted conclusions and recitals of the evidence taken out of context to support the government's position that the petitioners were engaged in a conspiracy.

It is stated that Abbate refused to go to Jackson, Mississippi, because it was too dangerous. However, the government omits to state that Abbate told McLeod the

day after Shelby made the proposal to them that he had "backed out" of this proposed venture (R. 54, 55) and that the petitioners were going to inform the telephone company of Shelby's plan.

The government also omits to state that under the questioning of the court, McLeod testified that Abbate said. "You take my advice and don't go down there yourself, we can take these plans and offer them to the company for a certain amount of money, for a large sum of money, then we can walk away and leave them the plans. Then they will know what to expect down south." (R. 57)

The government omits to state that McLeod told Perry in Jackson, Mississippi, that he would have to work alone (R. 71), and when he later met Shelby, he told him "these other guys had backed out and kept the money and he was going to double cross us." (R. 81)

The government does not completely state the conversation between McLeod and Abbate after the former was forced by Shelby to return to Chicago. The government's statement of the case reads as follows: "Abbate was anxious to know what Shelby thought about his failure to come south." This is a watered down version of the conversation between McLeod and Abbate. Actually, Abbate told McLeod that he was afraid he would be shot because he informed on them. The record shows that Abbate asked McLeod "if any of the boys wanted to knock his ears down for that double cross" (R. 108) and Abbate also said he was going to return the money because he was afraid somebody was going to put a hole in his head (R. 109), a statement not likely to be made by one engaged in a conspiracy.

1. The government contends that the circuits used by the government are means of communication operated and controlled by the United States for the reasons that they

were marked, closed circuits in operation twenty-four hours a day and that the telephone company could not make any repairs without permission of the government. An analysis of the cross examination of the government's witness, Willard L. Arbour, discloses that the government's use of a circuit is not materially different from that of the ordinary subscriber. The markings are in the test rooms of the telephone company where the paths to the various military bases are marked (R. 395). It is marked to alert the employees of the telephone company that they are security circuits (R. 395) and that the employees are not to listen in or interrupt the service (R. 396). The witness admitted that a private subscriber could receive the same service except for the government marking (R. 397). The government relies on the testimony of the witness, Arbour, that the circuits could not be repaired without the permission of the government. An examination of his testimony will disclose that permission was not actually required. It appears from the evidence that when the government had circuit trouble, the telephone company would be notified, not unlike the case of a private subscriber. The telephone company ordinarily would not be aware of circuit trouble without being informed of this condition. It was, therefore, not a matter of securing permission to make repairs but one of giving notice to the telephone company of circuit trouble which would cause the telephone company to make repairs.

We take the liberty of showing that the testimony of Arbour indicates that he confused "permission" with receiving notice from the government of circuit trouble. He testified as follows:

> "Q. * * * Can any of these circuits be repaired by Southern Bell Telephone Company without the permission of the United States Government?

"A. * * * And when those circuits go in trouble, the customer notifies us promptly, because they are in use all times, practically around the clock. Then we are notified to go in there and do that. Of course, now, there are times when the customer will come to us and ask us to let them have a circuit for a little while—I mean, we will go to the customer and ask nim to let us have that circuit for a little while in order to make some test or various other changes on it, but we can't take it without his permission, * * *." (R. 373)

"Q. Now, on these GFP cables you testified about, do you get permission from the government before you repair them?

"A. Yes, unless it's evident the whole circuit fails. In other words, if a cable should be totally destroyed, we're going to get an alarm on the thing, and we'll be dispatching people out there right away to repair that circuit. Of course, it doesn't take but a second for those people that are using that circuit all the time to know they're out, and they usually call us up and tell us immediately, 'we've lost this circuit. Will you please get it fixed?' " (R. 378, 379)

We believe that the evidence in the case shows that the government by leasing several circuits did not control and operate the coaxial cables and micro wave towers as charged in the indictment. That leasing of circuits is not synonymous with "operation and control" has been recognized by certain members of Congress is evidenced by the following bill to amend the statute involved in this case to include communication lines leased by the United States from a common carrier.

80th Congress
1st Session

S. 1571

IN THE SENATE OF THE UNITED STATES
March 12 (legislative day,
March 2), 1957

Mr. Bricker introduced the following bill; which was read twice and referred to the Committee on Interstate and Foreign Commerce

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A BILL

To amend section 1362 of title 18 of the United States Code in order to provide penalties for malicious damage to certain private communication facilities

Be It Enacted By The Senate And House Of Representatives Of The United States Of America In Congress Assembled, That Section 1362 of title 18 of the United States Code is amended by striking out "operated or controlled by the United States" and inserting in lieu thereof "leased, operated, or controlled by the United States or by any common carrier, as defined in section 3 (h) of the Communications Act of 1934".

2. The evidence concerning double jeopardy was before the trial court and the question was raised in the United States Court of Appeals for the Fifth Circuit on a petition for rehearing. We believe we have sufficiently stated our position in the petition for a writ of certiorari. Counsel for the Petitioner in the case of *Bartkus* v. *Illinois*, No. 39 this term, has presented practically the same problem to this

court and we cannot add to the scholarly brief concerning this question.

3. The government argues that Abbate was a keyman in the conspiracy because he contacted Falcone and McLeod, did most of the talking and received the money for expenses from Shelby. However, the conduct of Abbate and Falcone after the meeting with Shelby demonstrates clearly that they did not agree to participate in the proposal made by Shelby to destroy the property of the Southern Bell Telephone Company. Abbate and Falcone could not be engaged in a conspiracy with Shelby and McLeod to destroy the property of the telephone company and at the same time disclose the plot to the telephone company. Nor as fellow conspirators would they inform McLeod that they would not participate in this plot and advise him not to go to Jackson, Mississippi, to carry out Shelby's proposal.

The government argues that Abbate gave McLeod money to go to Jackson, Mississippi, and therefore, this was evidence that he was involved in the conspiracy. However, the government fails to account for McLeod's testimony that Abbate not only tried to dissuade him from going south to participate in the plot but also informed him that he would disclose the plans to the telephone company (R. 57). Although Abbate gave McLeod part of the money he received from Shelby, it was certainly not given by Abbate as a participant in the alleged conspiracy.

A conspiracy has been described as a partnership agreement having crime as its business committed by overt acts. One does not become a partner where he has no intent to enter into such an agreement. The petitioners listened to the proposal of Shelby, took his money under the pretense that they would do his bidding, but actually they never intended to engage in his scheme. Having received the money, the petitioners immediately communicated with the

telephone company which had previously offered a reward for such information (R. 278, 284).

The government cites the case of *United States* v. *Crimmins*, 123 F. 2d 271, to the effect that conspirators are chargeable with what was within reasonable intendment of the common understanding at the time they joined the conspiracy. The other cases relied upon by the government were cited by the Court of Appeals in its opinion and have been analyzed by us in the Petition to show that they are not applicable to our present case. The *Crimmins* case which we cited in our petition supports our view that one cannot conspire to destroy a government circuit of which he has no knowledge of its existence. In the *Crimmins* case, the defendant knew that the securities were stolen, but there was no evidence that he knew that they had been transported in interstate commerce. The court in reversing the conviction held that each conspirator is chargeable with the acts of his fellow done in furtherance of the joint venture; but into that must be read the condition that acts so imputed must be in execution of the venture as all understand it.

The petitioners here did not know that the installations which Shelby desired to destroy contained circuits used by the government. The petitioners were both Chicago residents, Abbate was employed as an insurance agent (R. 734), and Falcone worked for the Liquid Carbonic Company (R. 734). Neither of the petitioners had been employed by the telephone company, and there is no evidence that they had any knowledge that the coaxial cables and micro wave towers in Mississippi contained circuits leased by the government. Consequently, it cannot be said that they were presumed to know that these communications were used by the government.

4. In answer to our contention that the petitioners withdrew from the conspiracy if they did in fact engage in such, the government argues that the overt acts of Abbate in arranging a meeting of Falcone and McLeod with Shelby, the division of the expense money, and Falcone's agreement to furnish dynamite were acts in furtherance of a conspiracy. These acts are not charged as the overt acts in the indictment (R. 5). The meeting of the petitioners with Shelby and receiving his money as expenses was not in furtherance of any conspiracy because the petitioners had no intention of entering the conspiracy. The government is incorrect in stating that "Abbate gave McLeod money to go south, sending him on his criminal mission." (Government brief page 13). Although McLeod may have used the money given to him by Abbate to go to Jackson, he testified that Abbate advised him against going there and told McLeod that he was going to inform the telephone company of the plans (R. 57).

For the reasons stated in our petition and in this reply, we respectfully ask the court to grant a writ of certiorari.

Respectfully submitted,

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